

for FILED Roanoke
JUN 26 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JOHN E. CORCORAN, CLERK
BY: Fay Coleman
DEPUTY CLERK

KENDALL D. WRIGHT,)	Civil Action No. 7:06-cv-00634
Petitioner,)	
)	
v.)	<u>FINAL ORDER ADOPTING</u>
)	<u>REPORT AND RECOMMENDATION</u>
)	
UNITED STATES OF AMERICA,)	By: Hon. Norman K. Moon
Respondent.)	United States District Judge

Kendall D. Wright, filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255, challenging his re-sentencing on January 14, 2005 for conspiring to possess with the intent to distribute and distributing cocaine base and marijuana, in violation of 21 U.S.C. § 846; and two counts of possessing with the intent to distribute cocaine base and marijuana, in violation of 18 U.S.C. § 841(a)(1). Wright claims that his attorney was constitutionally ineffective in failing to discuss his right to appeal and in failing to file a notice of appeal. Wright was initially re-sentenced on January 5, 2005, five days before the Supreme Court decided United States v. Booker, 543 U.S. 220 (2005). Had petitioner timely appealed his re-sentencing to the United States Court of Appeals for the Fourth Circuit, the case would likely have been remanded so that Wright could be re-sentenced under Booker.

In the instant case, the United States moved for an evidentiary hearing on the ineffective assistance of counsel claims. The court granted the motion and referred the matter to United States Magistrate Judge B. Waugh Crigler for a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B). The Magistrate Judge subsequently filed a report, finding that the government conceded that petitioner should be granted § 2255 relief. The Magistrate Judge recommends that the court grant the § 2255 motion and vacate the January 14, 2005 Judgment. Neither party has filed objections. Having reviewed the Magistrate Judge's Report and Recommendation and pertinent

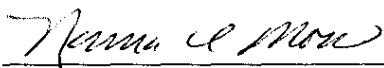
portions of the record, the court agrees with the Magistrate Judge's recommendation.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. The court **ADOPTS** the Magistrate Judge's factual finding that the government concedes that petitioner should be granted relief;
2. Petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 is **GRANTED**;
3. The Final Judgment Order, dated January 14, 2005, in Wright's Criminal Case No. 3:00cr00038-2 is **VACATED**;
4. In light of the decision in Booker, the clerk is **DIRECTED** to set Criminal Case No. 3:00cr00038-2 for re-sentencing;¹
5. The clerk is **DIRECTED** to arrange for appointment of counsel in the re-sentencing in the criminal case;² and
6. This matter is **STRICKEN** from the active docket of the court.

The Clerk of the Court is directed to send a certified copy of this Order to the petitioner.

ENTER: This 26th day of June, 2007.


United States District Judge

¹ In his current § 2255 action, Wright asks for a new time to appeal. However, if the court only re-entered the final judgment in his case with a new date of entry, when Wright appealed, the case would be remanded for re-sentencing under Booker. Accordingly, the court will re-sentence Wright now.

² The court will try to appoint Andrea Harris, Esq., the Federal Public Defender who represented Wright in this habeas action, to represent him in the underlying criminal case at his re-sentencing.